

# FEDERAL MARITIME COMMISSION

MITSUI O.S.K. LINES LTD.,

*Complainant,*

v.

GLOBAL LINK LOGISTICS, INC.,  
OLYMPUS PARTNERS, OLYMPUS  
GROWTH FUND III, L.P., LOUIS J.  
MISCHIANI, DAVID CARDENAS,  
KEITH HEFFERNAN, CJR WORLD  
ENTERPRISES, INC., AND CHAD J.  
ROSENBERG,

*Respondents.*

Docket No. 09-01

Served: January 30, 2014

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**BY THE COMMISSION:** Mario CORDERO, *Chairman*;  
Rebecca F. DYE, Richard A. LIDINSKY, JR., Michael A.  
KHOURI, and William P. DOYLE, *Commissioners*.

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## **Order Adopting Initial Decision**

### I. **PROCEEDING**

On May 5, 2009, Complainant Mitsui O.S.K. Lines, Ltd. (Mitsui or MOL), a vessel-operating common carrier (VOCC), filed this complaint against Respondents Global Link Logistics, Inc.

(Global Link); Olympus Partners; Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P.; Louis J. Mischianti; David Cardenas; and Keith Heffernan (collectively Olympus Respondents); and CJR World Enterprises, Inc. and Chad J. Rosenberg (collectively CJR Respondents) (Respondents). On June 16, 2009, Mitsui filed a Motion to File Amended Complaint and Amended Complaint, in order to identify more accurately the Respondents. The Amended Complaint made no changes to the allegations of the original complaint, and no additional legal issues were raised.

In the Amended Complaint, Mitsui alleged that Respondents violated sections 10(a)(1) and 10(d)(1) of the Shipping Act of 1984 (the Shipping Act)<sup>1</sup> and the Federal Maritime Commission's (FMC or Commission) regulations at 46 C.F.R. § 515.31(e), by engaging in a practice referred to as "split routing." Respondent Global Link is a licensed non-vessel-operating common carrier (NVOCC), and Mitsui alleges that between 2004 and 2006, Global Link engaged in split routing on Mitsui shipments in violation of the Shipping Act. Split routing occurs when an NVOCC books cargo with a VOCC for shipment to one inland destination in the United States, while intending to deliver the cargo to a different inland destination. Mitsui alleged that it suffered injury as a result of Respondents' split routing practice and is entitled to reparations. Global Link filed a Counterclaim against Mitsui, and Crossclaims against four of its co-Respondents: Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P.; CJR World Enterprises, Inc.; and Chad J. Rosenberg (Cross Respondents). Respondents other than Global Link filed motions to dismiss Mitsui's complaint. Cross Respondents filed motions to dismiss Global Link's Crossclaims.

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<sup>1</sup> On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. Section 10(a)(1) is now codified as 46 U.S.C. § 41102(a), and section 10(d)(1) is now codified as 46 U.S.C. § 41102(c). The Commission continues to cite provisions of the Shipping Act by their former section numbers.

On June 22, 2010, the Administrative Law Judge (ALJ)<sup>2</sup> issued a Memorandum and Order on Motions to Dismiss. *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1369 (ALJ 2010). Olympus Respondents filed an appeal contesting the ALJ's conclusion that the Commission had jurisdiction over the split routing practice involved in Mitsui's complaint. Global Link filed an appeal contesting the ALJ's dismissal of Global Link's Crossclaims against Cross Respondents. In addition, on July 22, 2010, the Commission issued a Notice of Commission Determination to Review the ALJ's dismissal of Mitsui's allegation that Olympus Respondents and CJR Respondents violated section 10(d)(1) of the Shipping Act.

On August 1, 2011, the Commission issued an Order in which it: (1) affirmed the ALJ's conclusion that the Commission has jurisdiction over the inland segment of intermodal through transportation; (2) affirmed the ALJ's dismissal of Global Link's first Crossclaim seeking indemnification based on the Stock Purchase Agreement and Delaware law; (3) vacated the ALJ's dismissal of Global Link's second Crossclaim seeking contribution, pending determination by the ALJ that Global Link was liable for violations of the Shipping Act and was required to pay more than its proportionate share of liability; (4) vacated the ALJ's dismissal of allegations that Olympus Respondents and CJR Respondents violated section 10(d)(1) of the Act; and (5) remanded the issue of whether these respondents violated section 10(d)(1) to the ALJ. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 143 (FMC 2011).

Subsequently, on August 10, 2011, the Commission issued an Order in which it responded to (1) a Joint Motion for Commission investigation of Mitsui O.S.K. Lines, Ltd., filed by Olympus Respondents and CJR Respondents, and (2) a Motion filed by Olympus Respondents seeking prompt resolution of an

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<sup>2</sup> This proceeding was initially assigned to ALJ Clay G. Guthridge. It was reassigned to ALJ Paul B. Lang on August 10, 2012.

interlocutory appeal involving the Commission's jurisdiction over the inland segment of an intermodal through movement, and stay of the proceedings before the ALJ. In its August 10, 2011 Order, the Commission denied the Joint Motion for Commission Investigation of Mitsui O.S.K. Lines, Ltd., and dismissed as moot Olympus Respondents' motion for prompt resolution of interlocutory appeal and stay of the proceedings before the ALJ. Order Denying Motion for Commission Investigation and Dismissing Motion for Prompt Resolution of Appeal and for Stay of Proceeding before Administrative Law Judge, at 7-8 (FMC August 10, 2011).

On February 17, 2012, the parties appeared before the ALJ for a hearing on several motions and filings: (1) request for issuance of a subpoena *duces tecum* addressed to Nintendo of America, Inc., submitted by Global Link; (2) Joint Motion to Compel Compliance with Outstanding Discovery and for Sanctions, filed by Olympus Respondents; and (3) Complainant's Motion for Leave to Subpoena and Re-Depose Non-Party Witness Paul McClintock Pursuant to Commission Rules 131 and 201, filed by Mitsui. On April 12, 2012, the ALJ issued a Memorandum and Order on Pending Motions, in which he denied Global Link's request to issue a subpoena *duces tecum* to Nintendo of America, Inc.; ordered Mitsui to describe in detail its practice with Nintendo pursuant to which Nintendo shipments were delivered to a destination other than that stated on the Mitsui bill of lading and to produce supporting documents; and denied the motion to subpoena and re-depose non-party witness Paul McClintock. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 715, 724-25 (ALJ 2012).

After reassignment of the proceeding to ALJ Lang and following several rulings by the ALJ concerning motions filed by Olympus Respondents, Olympus Respondents filed a Petition for Commission Action, in which they asked the Commission to order the ALJ to comply with the Commission's August 1, 2011 Order in this proceeding. On January 31, 2013, the Commission issued an Order Dismissing Petition for Commission Action, in which it concluded that Olympus Respondents' Petition was a repetitious

motion, and pursuant to Commission Rule 69(d), would not be entertained. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 1181, 1184 (FMC 2013).

On July 9, 2013, the ALJ issued the Initial Decision (ID). *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics Inc.*, 32 S.R.R. 1808 (ALJ 2013). In the ID, the ALJ concluded that Mitsui knew of and encouraged the practice of split routing by Global Link; any monetary losses suffered by Mitsui were proximately caused by its own actions; and Mitsui did not carry its burden of proof as to bad faith or deceit by the Respondents. The ALJ therefore dismissed Mitsui's Amended Complaint, in which Mitsui alleged that Respondents engaged in split routing, in violation of sections 10(a)(1) and 10(d)(1) of the Shipping Act. Because the ALJ concluded that Mitsui was not entitled to reparations from any of the Respondents, he dismissed Global Link's Crossclaims as moot. With regard to Global Link's Counterclaim, the ALJ concluded that any monetary loss that Global Link would have sustained would have been proximately caused by its own actions, and Mitsui did not violate the Shipping Act by instituting this proceeding. The ALJ therefore dismissed Global Link's Counterclaim. The ALJ concluded that Mitsui was not entitled to reparations, and denied Global Link's motion to introduce an expert witness report and testimony regarding reparations. Finally, the ALJ denied the motion of Olympus Respondents, joined by CJR Respondents and Global Link, to Strike False Statements in Complainant's Reply Brief in Further Support of its Claims against Respondents.

On July 31, 2013, Mitsui filed Exceptions to the ID (Mitsui Exceptions). In its Exceptions, Mitsui argues that numerous Findings of Fact (FF) and statements by the ALJ are contrary to the weight of the evidence, unsupported by the record, or otherwise erroneous. Specifically, Mitsui argues that the ID reflects fundamental misunderstandings of the practice of split routing, and these misunderstandings are fatal to the validity of the decision; the ALJ's Findings of Fact and statements regarding Mitsui's knowledge of split routing are incorrect; and there is no factual

basis to conclude that Mitsui benefited from split routing. Mitsui also argues that numerous Conclusions of Law in the ID are erroneous. Specifically, Mitsui argues that the ALJ erred in relying on apparent authority; in imputing the knowledge of Mitsui employees Paul McClintock and Rebecca Yang<sup>3</sup> to Mitsui; in applying the Shipping Act and FMC regulations; and in applying the filed rate doctrine. Mitsui requests that the Commission hear oral argument on its Exceptions, and urges the Commission to reverse the ID, issue new Findings of Fact and Conclusions of Law, and hold that Mitsui is entitled to recover reparations (including interest and attorney fees) for the unlawful conduct of Respondents.

Global Link, Olympus Respondents, and CJR Respondents filed replies to Mitsui's Exceptions on August 22, 2013. In their replies, Respondents generally concur with the ALJ's conclusion that Mitsui's knowledge of and participation in split routing bars its Shipping Act claims against them, and they argue that the ID is correct and should be affirmed.

## II. DISCUSSION

Mitsui's Exceptions raise issues concerning: (1) the ALJ's Findings of Fact related to the practice of split routing, Mitsui's knowledge of split routing, and benefits that Mitsui may have received from split routing, and (2) the ALJ's Conclusions of Law related to apparent authority, imputation of knowledge of MOL employees McClintock and Yang to MOL, application of the Shipping Act and FMC regulations, and application of the filed rate doctrine. Pursuant to the Commission's Rules of Practice and Procedure, when exceptions are filed to, or the Commission

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<sup>3</sup> Paul McClintock was Vice President and General Manager of Mitsui's operations in the South Atlantic and Gulf of Mexico from 1995 to 2006 or 2007. In 2006 or 2007, McClintock became Mitsui's Vice President of Sales and Sales Support, and was responsible for all of Mitsui's sales representatives in the United States. Global Link Logistics, Inc. Appendix (GLL App.) at 11-12. Rebecca Yang began working as a sales representative for Mitsui around 1993, and became Mitsui's primary contact with Global Link. *Id.* at 14, 31.

reviews, an initial decision, “the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision.” 46 C.F.R. § 502.227(a)(6). Accordingly, we review the Initial Decision *de novo*.

#### A. Findings of Fact

In the ID, the ALJ set out Findings of Fact related to the parties; the practice of split routing; inquiries by Global Link as to the legality of split routing; Mitsui’s knowledge of split routing by Global Link and its effect on Mitsui; and the Partial Final Arbitration Award. 32 S.R.R. at 1838-45. The ALJ linked each Finding of Fact to a citation in the record. Mitsui takes exception to certain Findings of Fact, discussed below.

##### 1. Mitsui’s Exceptions to Certain Findings of Fact

Mitsui argues that certain Findings of Fact and statements in the ID are “contrary to the weight of the evidence, unsupported by the record, or are otherwise erroneous.” Mitsui Exceptions at 6. Mitsui identifies three subject matter areas that it argues are tied to erroneous Findings of Fact or statements in the ID: the ALJ’s understanding of the practice of split routing; Mitsui’s knowledge of split routing; and the conclusion that Mitsui benefited from split routing. Consideration of Mitsui’s arguments in connection with each of these three subject matter areas follows.

###### a. Mitsui Argument: Misunderstandings of Split Routing in ID Fatal to Decision

With regard to the ALJ’s understanding of split routing, Mitsui identifies the following Findings of Fact as reflecting the ALJ’s “misunderstanding” of split routing: FF 6, 16, 32 (including footnote 48), and 47 (including footnote 51). In addition, Mitsui identifies a number of statements, in both the body and in footnotes of the ID, that it argues also reflect a misunderstanding of split

routing. *Id.* at 16-22.<sup>4</sup>

Review of the identified Findings of Fact and the evidence upon which the Findings are based, supports the conclusion that the Findings are based on relevant evidence that is adequate to support the conclusions reflected in the Findings. There is nothing in FF 6, 16, 32, or 47 that reflects a fundamental misunderstanding of split routing that is “fatal to the validity of the decision.” *Id.* at 7. Review of the evidence cited by the ALJ to support these Findings, i.e., a Mitsui exhibit, Mitsui Proposed Findings of Fact, Yang’s deposition, and a Global Link exhibit, reveals that the cited evidence supports the related Findings.

Mitsui objects to the ALJ’s use of the term “regional door points” in FF 6. The ALJ actually referred to “regional door points,” or destinations in service contracts, in FF 6, and while the service

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<sup>4</sup> Mitsui identifies two statements in the body of the ID, and six statements in footnotes, and argues that they reflect a misunderstanding of split routing that is fatal to the validity of the ID. In one of the statements, Mitsui disagrees with the ALJ’s statement that Global Link used split routing for Mitsui shipments whenever it was necessary to deliver cargo to door points not named in the contracts between Global Link and Mitsui. While Mitsui argues that this statement is incorrect, it offers no evidence in support. In the other statement, Mitsui states that the ALJ’s reference to a “house bill of lading” is either an error or reflects a fundamental misunderstanding of split routing. The ALJ’s use of the term house bill of lading instead of master bill of lading appears to be a harmless error. The ALJ stated that “[s]imple logic dictates that rank and file operations employees performed the actual functions of preparing the house bills of lading and of dealing with truckers if necessary,” in support of the point that “lower-level Mitsui employees knew of the split routing in spite of Mitsui’s request that Global Link employees not discuss the matter with such employees.” 32 S.R.R. at 1847. Use of the term house bill of lading instead of master bill of lading does not negate the point that lower-level Mitsui employees were preparing bills of lading and dealing with truckers when necessary, and therefore would have had some knowledge of the split routing practice. With regard to the statements in footnotes in the ID to which Mitsui takes exception (footnotes 21, 40, 43, 50, 51, and 60), Mitsui argues in each case that the statement in question reflects a misunderstanding or misinterpretation of the evidence, but offers no persuasive evidence to support its position. Mitsui’s disagreement with the ALJ’s interpretation of the evidence does not provide grounds for reversal of the ID.

contracts in the record may not use the phrase “regional door points,” testimony in the record indicates that the term “door points” was used by both Mitsui and Global Link, so that the ALJ’s reference does not reflect a misunderstanding of split routing that is fatal to the decision, as argued by Mitsui. *See* GLL App. at 17, 35, and 39. In addition, in its Exceptions, Mitsui itself refers to “originally declared door points” to describe destinations specified in its service contracts. *See* Mitsui Exceptions at 11.

Mitsui also takes exception to FF 16 in the ID, in which the ALJ stated that “Global Link would attempt to locate truckers who would cooperate with the split moves by reducing their charges to conform to the actual delivery points rather than assessing the charges to the destinations shown on the Mitsui bills of lading.” The ALJ cited Mitsui Proposed Findings of Fact (PFF) 45 in support of FF 16. 32 S.R.R. at 1839. In its PFF 45, Mitsui states that split routing “required locating a ‘preferred trucker’ with the lowest or best cost in transporting the last leg of the transit,” a statement that is consistent with the point in FF 16 that Global Link looked for truckers who would charge according to actual delivery points, rather than according to destinations shown on Mitsui bills of lading. *See* Mitsui Exhibit S (App. at 1213-14). In addition, e-mail messages show that Mitsui was aware of trucking deliveries to locations other than those on Mitsui bills of lading. *See* GLL App. at 132-33. Therefore, there is relevant evidence in the record to support FF 16.

Mitsui also takes exception to FF 32 in the ID, in which the ALJ stated that “Mitsui could not charge diversion fees because the contracts did not include the actual destinations,” and that Mitsui’s employee Yang “assumed that Jim Briles of Global Link would have complained to her if Mitsui had attempted to impose diversion charges.” 32 S.R.R. at 1841. The ALJ cited portions of Yang’s deposition in support of the statements in FF 32, and a review of her deposition supports this statement. In her deposition, Yang stated that she “would think” that Operations at Mitsui knew that diversions were going on, but Mitsui did not seek diversion charges

because Yang stated that Jim Briles of Global Link “would have complained to me.” *See* Yang Deposition, GLL App. at 38-39. Therefore, there is relevant evidence in the record to support FF 32.

Finally, Mitsui takes exception to FF 47, in which the ALJ described a message sent by an employee of a trucking company to a Global Link employee, stating that the trucking company would reduce its trucking charge, thereby “contributing . . . to the ‘diversion fee for Global Link.’” 32 S.R.R. at 1842. The ALJ went on to state that “Mitsui would apply the \$100 to the next instance in which Global Link needed a diversion fee so that Global Link would not be ‘out of pocket.’” *Id.* at 1842-43. While Mitsui argues that “the ALJ misreads the e-mail from Evans trucking,” (Mitsui Exceptions at 15), FF 47 accurately portrays the information conveyed in the e-mail from the trucking company to Global Link, i.e., that Mitsui, Global Link, and the trucking company worked out an arrangement whereby the trucking company would reduce its trucking bill, and Mitsui would take the money it made off the trucking and contribute it the next time Global Link needed a diversion fee. *See* GLL App. at 127. Therefore, FF 47 is supported by relevant evidence.

b. Mitsui Argument: Findings of Fact Incorrect Regarding Mitsui’s Knowledge of Split Routing

In connection with its argument that certain Findings of Fact regarding Mitsui’s knowledge of split routing are incorrect, Mitsui identifies the following: FF 33, 36, 37, and 48. Mitsui Exceptions at 22-28. In addition, Mitsui identifies one statement in the body of the ID that it argues is inconsistent with other statements in the ID. *Id.* at 27.<sup>5</sup>

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<sup>5</sup> In the questioned statement, the ALJ charged Mitsui with knowledge that in some cases, Global Link was not paying it for transportation to the actual inland destinations of shipments, although in other cases, Global Link paid Mitsui for transportation to destinations that were farther than the actual door points where the shipments were delivered. 32 S.R.R. at 1850. Mitsui argues that this

Review of the identified Findings of Fact and the evidence upon which they are based, supports the conclusion that the Findings are based on relevant evidence adequate to support the conclusions reflected in the Findings. There is nothing in the evidence supporting FF 33, 36, 37, or 48 that demonstrates that the ALJ's conclusions regarding Mitsui's knowledge of split routing are incorrect, as argued by Mitsui. The evidence supporting these Findings of Fact includes the deposition of Yang, a Mitsui employee (GLL App. at 30-51), and the deposition of James Briles, a Global Link employee (*Id.* at 52-56).

Mitsui takes exception to FF 33, in which the ALJ stated that while Yang was with Mitsui, she would "not have been surprised to learn that goods were being delivered to destinations other than those contained in Mitsui bills of lading." 32 S.R.R. at 1841. In support of this conclusion, the ALJ cited Yang's deposition. *See* GLL App. at 34. In that deposition, Yang agreed

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statement is inconsistent with an earlier statement that it was "unclear whether GLL engaged in shortstopping with MOL." Actually, the ALJ's earlier statement was that it was unclear "whether Global Link's alleged cessation of shortstopping included its dealings with Mitsui as well as with other ocean carriers." *Id.* at 1839 n. 40. According to the ALJ, "shortstopping" occurs "when the motor carrier collects more from the ocean carrier than it is entitled." *Id.* The split routing practice involved in this proceeding "consisted of booking cargo to false inland destinations while intending to deliver the cargo to other inland destinations." *Id.* at 1838. There is evidence in the record showing that Respondents viewed these two practices differently. For example, Chad J. Rosenberg, an officer and director of Global Link during the period when CJR World Enterprises, Inc. was an owner of Global Link, apparently understood advice from their attorney to mean that "split routing was legal, but that shortstopping 'may be illegal,'" and therefore "instructed Global Link personnel to stop the practice of shortstopping 'to the extent it was occurring.'" *Id.* at 1839. The ALJ's statements reflect what appears in the record in connection with the two practices, and the statements are not inconsistent. Mitsui's second argument is that there is no basis upon which the ALJ could reasonably conclude that MOL benefited from the practice of split routing. To the contrary, there is evidence in the record in the depositions of Chad Rosenberg (GLL App. at 4-7), and Paul McClintock (*Id.* at 8-29), that Global Link's split routing relieved Mitsui from the burden of having to negotiate numerous additional door points with Global Link.

that it was a common occurrence for goods to be delivered to a destination other than the one listed on the bill of lading, and stated that it “wouldn’t be a surprise” if that were happening when she was with Mitsui. *Id.* Mitsui’s argument that Yang’s testimony is unreliable is not persuasive, as Mitsui itself states in its Exceptions that “the weight of evidence in the record indicates that Ms. Yang was aware of split routing.” Mitsui Exceptions at 12-13.

Mitsui also takes exception to FF 36, in which the ALJ stated that Mitsui employee McClintock told Global Link employee Briles that “he wanted knowledge of split routing to be confined to upper-level management of Global Link and Mitsui.” 32 S.R.R. at 1841-42. The ALJ cited Briles’ deposition in support of this statement. In his deposition, Mr. Briles stated that the only conversations he had with Mr. McClintock were that discussions about split moves should be kept to “high-level management of Global Link and MOL.” GLL App. at 55-56. Briles’ deposition therefore supports the statement in FF 36. Mitsui argues that the ALJ erred in finding that discussions of split routing were to be limited to upper-level management, and urges the Commission to find that “discussions about and knowledge of split routing were limited to McClintock and Yang.” Mitsui Exceptions at 24. Evidence in the record, however, reveals that Mitsui employees other than McClintock and Yang knew about split routing with Global Link.<sup>6</sup>

Mitsui next takes exception to FF 37, in which the ALJ stated that “[n]o Mitsui representative at McClintock’s and Yang’s level refused to do a split move,” and although “certain lower level Mitsui employees raised objections, McClintock and Yang encouraged the practice.” 32 S.R.R. at 1842. The ALJ cited Briles’ deposition in support of FF 37. *See* GLL App. at 54. In his

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<sup>6</sup> There is evidence in the record indicating that the following Mitsui employees were aware of split routing with Global Link: Diane Chick, Jean Flaherty, and Kelly Johnson at the operations manager level; and Jane Martin and Amy Sinclair at the operations staff level. *See, e.g.,* GLL App. at 37, 132-34.

deposition, Mr. Briles was asked whether he ever heard of or had contact with anyone at MOL who refused to do a split move, and he stated “[a]t that level [the level of McClintock and Yang], no.” *Id.* The ALJ’s finding in FF 37 is thus supported by the record. Mitsui’s argument that FF 37 is “flawed because it takes the testimony out of context” (Mitsui Exceptions at 24), is not persuasive, as Mr. Briles’ answer supports the statement in FF 37.

Finally, Mitsui takes exception to FF 48, in which the ALJ stated that “Briles informed representatives of Mitsui of situations in which shipments were not going as far as the destinations contained in the contract,” and that the “last time he did so was during the course of a conversation with McClintock in July or August of 2007.” 32 S.R.R. at 1843. The ALJ cited the deposition of Mr. Briles in support of this Finding of Fact. GLL App. at 53. In his deposition, Mr. Briles stated that he was in contact with McClintock and Yang, representatives of Mitsui, about situations in which the actual destination was closer than the destination in the contract, which supports the statement in FF 48 that “Briles informed representatives of Mitsui” of these situations. *See* GLL App. at 53-54. Mitsui’s argument that there is “no evidence in the record to support the conclusion that Briles informed anyone at MOL other than McClintock and Yang about split routing,” (Mitsui Exceptions at 26), does not provide a reason to find that the ALJ erred in FF 48, and actually supports the ALJ’s statement that “Briles informed representatives of Mitsui” of situations in which shipments were not going as far as destinations in the contracts.

c. Mitsui Argument: There is No Factual Basis to Conclude that Mitsui Benefited from Split Routing

In connection with its argument that there is no factual basis to conclude that Mitsui benefited from split routing, Mitsui takes exception to FF 39, 40, 41, and 42. In addition, Mitsui takes

exception to three statements in the ID.<sup>7</sup> Review of the identified Findings of Fact and the evidence upon which they are based, supports the conclusion that the Findings are based on relevant evidence adequate to support the conclusions reflected in the Findings. There is nothing in the evidence supporting FF 39, 40, 41, and 42 that demonstrates that the ALJ's conclusion that Mitsui received benefits from split routing is incorrect, as argued by Mitsui. The evidence supporting these Findings of Fact includes the depositions of Paul McClintock (GLL App. at 8-29), and Chad Rosenberg (*Id.* at 4-7).

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<sup>7</sup> Mitsui takes exception to a statement in the ID that Global Link took over arrangements for the inland phase of some Mitsui shipments, which relieved Mitsui from having to deal with truckers and other details of inland moves, and also relieved Mitsui of exposure to railroad detention charges. 32 S.R.R. at 1847. Mitsui argues that this statement is a summary of erroneous findings of fact made by the ALJ in FF 39, 41, and 42. Mitsui's Exceptions to each of these Findings of Fact are discussed in the body of this Order. Mitsui also takes exception to a statement in the ID that "the evidence does not support the proposition that Global Link had reason to believe that McClintock and Yang were acting outside of the scope of their authority." *Id.* at 1849. The advice of an attorney consulted by Global Link was that while "shortstopping was a fraud on the carrier, there would have been no fraud if the carrier knew what was going on." *Id.* Mitsui presents no evidence to show that Global Link had reason to believe that McClintock, a vice president at Mitsui with responsibility for sales nationwide, and Yang, a Mitsui chief sales representative, were acting outside their respective scopes of authority. Mitsui also argues that the ALJ's statement that there would have been no fraud if the carrier knew what was going on, is incorrect as a matter of law. This argument will be addressed in connection with Mitsui's exceptions to certain of the ALJ's Conclusions of Law. Finally, Mitsui takes exception to a statement that Mitsui benefited from split routing, and that these benefits "were not so insubstantial or incredible as to impose a duty on the Respondents to question their authority to act on behalf of Mitsui." *Id.* Mitsui argues that it has already demonstrated in its Exceptions that it did not benefit from split routing, and the testimony of McClintock and Yang that Mitsui did benefit is not credible. Mitsui Exceptions at 35. Mitsui has not shown that McClintock's and Yang's testimony lacked credibility with respect to statements regarding benefits Mitsui received from split routing with Global Link. According to McClintock and Yang, Mitsui benefited from having Global Link assume responsibility for the delivery of cargo to door points, and responsibility for rail detention charges. *See* GLL App. at 17, 40.

Mitsui first takes exception to FF 39, in which the ALJ stated that “[i]t was a significant benefit to Mitsui for Global Link to assume the responsibility for delivery of goods to door points,” and that while other customers of Mitsui also handled the inland phase of transportation, “Global Link was unusual in that it used truckers that charged the market rate that Mitsui had agreed to.” 32 S.R.R. at 1842. The ALJ cited Paul McClintock’s deposition in support of FF 39. *See* GLL App. at 17. In his deposition, Mr. McClintock responded to the statement that a significant benefit of the Global Link contract to Mitsui was that Global Link took on much of the responsibility of cargo delivery to door points, saying that there was a benefit to Mitsui because Global Link “took on all the responsibility for the appointments, for the delivery, yes.” *Id.* Mr. McClintock also stated that “what was a little unusual about Global Link was that they made all the arrangements,” and “they used truckers that charged what our [Mitsui’s] market rate was . . . .” *Id.* Mr. McClintock’s statements support the information set out by the ALJ in FF 39. Mitsui argues that while the ALJ found McClintock’s testimony to be “self-serving” and unreliable, he nonetheless relied on it. Mitsui Exceptions at 28. Contrary to Mitsui’s argument, the ALJ did not find Mr. McClintock’s testimony to be “unreliable” generally; what the ALJ said was that he did not credit McClintock’s testimony about a specific question, i.e., whether “Mitsui’s general counsel was consulted with regard to split routing in August of 2005.” 32 S.R.R. at 1847-48. The ALJ’s reliance on McClintock’s testimony regarding the benefits to Mitsui from Global Link’s assumption of responsibility for cargo delivery to door points is justified.

Mitsui next takes exception to FF 40, in which the ALJ stated that “[w]hen Global Link took over the inland phase of the shipments, it relieved Mitsui of the necessity of performing the work associated with delivering the goods to the customers’ door points,” which “resulted in Global Link paying Mitsui for a service that Global Link itself was performing.” *Id.* at 1842. The ALJ also stated that “Mitsui was having trouble keeping up with the volume of Global Link shipments.” *Id.* The ALJ cited Mr. McClintock’s

deposition in support of FF 40. *See* GLL App. at 9. In his deposition, Mr. McClintock stated as follows:

[W]hen we [MOL] first started doing business with Global Link, they were hitting us with some very big lines of business, so we would have – we would have 50 or 100 containers show up in Chicago or show up in Norfolk or show up in Atlanta or Charlotte or whatever, and so we were having some issues keeping up with the appointments, and we were having issues with rail detention, so that rail detention fell on MOL to pay, because we were having trouble keeping up with the deliveries, because that takes a lot of coordination, and you got to know who to contact at the warehouse for the appointments and all that kind of stuff.

So when Global Link decided that they were going to take over that process, it was, from where I was sitting, was [a] happy day, it was a good thing, because it took the burden off of us to make the appointments, to schedule the deliveries, and to beat the free time issue at wherever the containers were, whatever CY [container yard] they were at.

*Id.* Mr. McClintock also stated in his deposition that “in the case of Global Link, they took over all that work, so they were paying for something that they weren’t getting.” *Id.* Mr. McClintock’s testimony thus supports the ALJ’s statement in FF 40 that Global Link was paying Mitsui for a service that Global Link itself was performing. Mitsui argues that FF 40 is based solely on the “discredited testimony of Paul McClintock,” but does not show how Mr. McClintock’s testimony has been discredited or why it is “unreliable.” *See* Mitsui Exceptions at 31-2.

Mitsui next takes exception to FF 41, in which the ALJ stated that “Global Link’s assumption of responsibility for the inland phase of the shipments also relieved Mitsui of its exposure to

ever-increasing detention charges by the railroads for goods that were not removed from railroad premises before the expiration of ‘free time.’” 32 S.R.R. at 1842. In support of this Finding of Fact, the ALJ again cited Mr. McClintock’s testimony. *See* GLL App. at 9-10. In his deposition, Mr. McClintock stated as follows:

So if you have containers coming to the railroad, and it’s store door delivery, if the containers had cleared customs, and the customer is available for the appointments, then you’re free to deliver the containers. Once the carrier is free to deliver the containers, the burden is on the carrier who is arranging the store door delivery to get those containers delivered within a free time for – you know, so there’s no rail detention. And rail detention is incredibly punitive.

*Id.* at 10. Mr. McClintock further stated that Mitsui was “paying some major, major – detention charges with the railroad for a lot – for a lot of door customers, but Global Link was unique, because they were bringing in – you know, it was a big customer.” *Id.* When Mr. McClintock was asked whether he was relieved when Global Link decided that they would take over the inland delivery portion of the transportation, Mr. McClintock responded “Yes, Yes.” *Id.* Mr. McClintock’s testimony thus supports the ALJ’s statement in FF 41 that Global Link’s assumption of responsibility for the inland phase of shipments relieved Mitsui from exposure to railroad detention charges. Mitsui again argues that Mr. McClintock’s testimony is unreliable but offers no evidence to support this assertion. Mitsui Exceptions at 33.

Finally, Mitsui takes exception to FF 42, in which the ALJ stated that “Yang expressed appreciation to Rosenberg for Global Link’s split routing,” because “[a]ccording to Yang, it was easier for Mitsui to continue to book shipments to regional door points rather than to add a number of additional door points.” 32 S.R.R. at 1842. In support of FF 42, the ALJ cited Chad Rosenberg’s

deposition. *See* GLL App. at 6. In his deposition, in response to a question as to whether anyone at a steamship line ever thanked him for not bringing split routing to their attention so that the steamship line would not have to divert shipments, Mr. Rosenberg stated that Rebecca Yang “advised us [Global Link] it would be easier on them [Mitsui] – for us to book to point – regional points versus them having to keep getting us all these additional points.” *Id.*

In addition to Mr. Rosenberg’s testimony, Ms. Yang’s testimony supports the statement in FF 42. In her deposition, Ms. Yang was asked the following question concerning Global Link’s use of its preferred truckers to perform door deliveries: “it was in some ways a significant benefit to MOL, wasn’t it, because they took over a lot of the responsibility that ordinarily ‘they,’ being Global Link, took over a lot of the responsibility that MOL would have had to have assumed?” GLL App. at 40. Ms. Yang responded as follows: “Right, because that reduced the work load for our Operations people.” *Id.* In response to a question as to whether this was a significant benefit to MOL in terms of administrative expense and work, Ms. Yang responded “[c]orrect.” *Id.* Ms. Yang’s testimony thus supports the statement in FF 42, that it was easier for Mitsui to continue to book shipments to regional door points than to add additional door points. Mitsui argues that Yang’s testimony is self-serving and unreliable, and is contradicted by other evidence in the record showing that service contracts between GLL and Mitsui were amended frequently. Mitsui Exceptions at 33. The fact that Mitsui frequently amended contracts does not negate McClintock’s and Yang’s testimony that it was easier on Mitsui if Global Link booked to regional points, in light of the quantities of containers Global Link was apparently moving via Mitsui. *See* GLL App. at 9, 40.

## B. Conclusions of Law

In its Exceptions, Mitsui argues that the ALJ erred in the following Conclusions of Law: relying on the concept of apparent authority; imputing the knowledge of MOL employees McClintock

and Yang to MOL; applying the Shipping Act and the Commission's regulations; and applying the filed rate doctrine.

Mitsui first argues that the ALJ erred in applying the concept of apparent authority in this case, and, even assuming that apparent authority is the correct test, the ALJ erred in the application of the test. Mitsui argues that the ALJ's conclusion that Mitsui employees McClintock and Yang had apparent authority to act for Mitsui is incorrect, based on the facts that (1) Global Link did not have a reasonable belief that McClintock and Yang had authority to engage in split routing, and (2) Global Link did not deal with Mitsui in good faith. Mitsui Exceptions at 40. Mitsui urges the Commission to reverse the ALJ's conclusion that McClintock and Yang had apparent authority to act for Mitsui.

Mitsui argues that the ALJ "should have focused on the imputation of knowledge and the adverse interest exception . . . ." *Id.* at 37. Mitsui states that as a general matter, the knowledge of an agent is imputed to its principal, but the adverse interest exception to the general rule prevents imputation of knowledge by "blocking the imputation of the agent's knowledge to the principal when the agent is acting adversely to the principal, or is engaged in fraud against the principal." *Id.* at 40. Mitsui states that the "ALJ's consideration of the adverse interest exception was based entirely on one case decided by the Second Circuit Court of Appeals," and in that case, "the Second Circuit applied an extremely narrow interpretation of the adverse interest exception." *Id.* at 41. Mitsui argues that the Second Circuit's decision is contrary to those of other circuit courts of appeal, and it was improper for the ALJ to focus entirely on one circuit's decision. Mitsui states that by "focusing only on whether McClintock and Yang acted in a manner adverse to the interests of MOL and whether they entirely abandoned MOL's interest, the ALJ erred by overlooking other formulations of the adverse interest exception which apply in this case, and which prevent the knowledge of McClintock and Yang from being imputed to MOL." *Id.* at 41-2. According to Mitsui, the ALJ erred in focusing only on the adversity of the actions of

McClintock and Yang to the interest of MOL, and “should have also considered whether the imputation of the knowledge of McClintock and Yang was precluded by their collusion with GLL and/or GLL’s knowledge that McClintock and Yang would not advise MOL of split routing.” *Id.* at 44.

Mitsui argues that the knowledge of McClintock and Yang may not be imputed to MOL under any of the three tests it sets out for determining when knowledge of an agent will not be imputed to a principal: (1) when actions of agents are adverse to the principal; (2) when agents collude with a third party; or (3) when a third party knows that agents will not advise their principal of their actions. Mitsui states that “McClintock and Yang had abandoned the interests of MOL and were furthering only their own interests and/or those of GLL.” *Id.* at 44. Furthermore, Mitsui argues that evidence in the record “supports a conclusion that McClintock and Yang colluded with Respondents to keep split routing a secret from MOL.” *Id.* at 45. Mitsui also argues that “it is clear that GLL knew McClintock and Yang would not disclose split routing to MOL.” *Id.* Finally, Mitsui argues that this case is “on all fours with *Seamaster*;<sup>8</sup> the ALJ erred in distinguishing *Seamaster* from this case; and the Commission should reverse the ALJ’s error and be guided by *Seamaster*. *Id.* at 48.

In its reply, Global Link states that while the ALJ’s Findings of Fact and legal conclusions are largely correct, the ALJ erred in (1) giving insufficient consideration to facts in the record which render the adverse interest exemption analysis unnecessary, and (2) concluding that MOL’s legal counsel was not aware of the ongoing split routing. GL Response at 30. Global Link argues that the adverse interest exception is not applicable, given evidence establishing that Mitsui has a longstanding policy of engaging in split routing, not only with Global Link but also with other large shippers such as Nintendo; McClintock and Yang were given broad

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<sup>8</sup> *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 2013 U.S. Dist. LEXIS 40466 (N.D. Cal. March 21, 2013) (*Seamaster*).

authority by Mitsui to handle its business with Global Link; McClintock gained no personal benefit from split routing; numerous other Mitsui employees were on notice of the split routing; and Mitsui profited as a result of its business with Global Link.

#### 1. Apparent Authority

Turning first to Mitsui's argument that the ALJ erred in applying the concept of apparent authority, the ALJ stated that "senior Mitsui management placed McClintock and Yang in positions which justified Global Link's reliance on their authority to act on behalf of Mitsui in consenting to and encouraging the practice of split routing by Global Link." 32 S.R.R. at 1848. The ALJ continued that "[s]tated otherwise, McClintock and Yang had at least apparent authority to act on behalf of Mitsui in consenting to and encouraging the practice of split routing by Global Link." *Id.*

The RESTATEMENT (THIRD) OF AGENCY (2006) provides the following definition of apparent authority:

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

#### RESTATEMENT (THIRD) OF AGENCY § 2.03

During the time period when Mitsui alleges that Global Link and the other Respondents engaged in split routing in order to fraudulently obtain ocean transportation for less than the rates and/or charges that would otherwise apply, Global Link's primary contacts at Mitsui were Paul McClintock and Rebecca Yang. As described above, Paul McClintock was a Vice President and General Manager of Mitsui's operations in the South Atlantic and

Gulf of Mexico, from 1995 to 2006 or 2007. In 2006 or 2007, he became Mitsui's Vice President of Sales and Sales Support, and while he was responsible for all of Mitsui's sales people in the United States, he still interacted with major customers, including Global Link. FF 28. Rebecca Yang began working for Mitsui around 1993, and became Mitsui's primary contact with Global Link. She and McClintock handled contract negotiations and rates. FF 29. In her deposition, Ms. Yang stated that communications between Global Link and MOL that were rate-related or space-related went through her. GLL App. at 31. When asked if she would be Global Link's primary contact if they wanted to add a door rate, Ms. Yang stated that she was the primary contact in most cases, but that there "were some rates that Paul McClintock had to go to the trade management himself." *Id.* Ms. Yang continued that both she and Mr. McClintock worked on the Global Link account "because their – their buying was really huge," and that sometimes when she was travelling and Global Link could not reach her, they would "find Paul McClintock to talk to," because he knew all of Ms. Yang's customers and he assisted her in handling the accounts. *Id.*

While Mitsui argues that Global Link did not have a reasonable belief that McClintock and Yang had authority to engage in split routing, Mitsui had placed McClintock and Yang in positions that justified Global Link's reliance on their authority to act on behalf of Mitsui. Global Link's belief that McClintock and Yang had authority to act on behalf of Mitsui is traceable to Mitsui's "manifestation," i.e., the fact that Mitsui placed McClintock and Yang in positions that incorporated responsibility for overseeing contracts between Mitsui and Global Link. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.03, 3.03. In addition, because there were benefits to Mitsui when Global Link began to handle door deliveries, as described by McClintock in his deposition, it was reasonable for Global Link to believe that McClintock and Yang had authority to engage in split routing. In his deposition, Mr. McClintock stated that when Mitsui first started doing business with Global Link, the volume of shipments was large and Mitsui was having trouble keeping up with deliveries. As

a result, Mitsui was subject to rail detention charges. Therefore, Mr. McClintock stated that when Global Link decided that it would take over the delivery process, “it was, from where I was sitting, was [a] happy day, it was a good thing, because it took the burden – it took the burden off of us to make the appointments, to schedule the deliveries, and to beat the free time issue at wherever the containers were . . . .” GLL App. at 9. It does not appear that the ALJ erred in concluding that McClintock and Yang had apparent authority to act on behalf of Mitsui, based on the facts that Mitsui placed McClintock and Yang in positions of authority over Mitsui’s service contracts with Global Link, and there were benefits to Mitsui from McClintock’s and Yang’s actions in connection with Global Link’s delivery arrangements under their contracts.

## 2. Imputation of Knowledge to a Principal and the Adverse Interest Exception

Mitsui argues that the ALJ erred in imputing the knowledge of McClintock and Yang to it, but Mitsui also acknowledges that “[a]s a general matter, the knowledge of an agent is imputed to its principal.” Mitsui Exceptions at 40. This principle is consistent with a comment to the RESTATEMENT (THIRD) OF AGENCY, that generally, “a principal is charged with notice of facts that an agent knows or has reason to know.” RESTATEMENT (THIRD) OF AGENCY § 5.03, Comment a. Further, an agent generally must be found to have acted within the scope of his employment: “[k]nowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation.” *United States v. Sun-Diamond Growers of California*, 964 F. Supp. 486, 491 n. 10 (D.D.C. 1997). The following comment concerning imputation of knowledge to a principal provides further clarification:

It is helpful to view questions about imputation from the perspective of risk assumption, taking into account the posture of the third party whose legal relations with the principal are at issue. A principal assumes the risk that the agents it

chooses to interact on its behalf with third parties will, when actual or apparent authority is present, bind the principal to the legal consequences of their actions. This is because the principal chooses its agents, has the right to control them, and determines how to characterize its agents' positions and indicia of authority in manifestations made to third parties.

RESTATEMENT (THIRD) OF AGENCY § 5.04, Comment c.

The adverse interest exception provides that knowledge of an agent acquired in the course of the agency relationship is not imputed to the principal if the knowledge is acquired by the agent in a course of conduct that is entirely adverse to the principal. *See* "Imputation, the Adverse Interest Exception, and the Curious Case of the Restatement (Third) of Agency," Mark J. Loewenstein, 84 U. Colo. L. Rev. 305, 326 (Spring 2013). The RESTATEMENT (THIRD) OF AGENCY provides the following guidance concerning an agent acting adversely to a principal:

§ 5.04 An Agent Who Acts Adversely to a Principal

For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. Nevertheless, notice is imputed

- (a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or
- (b) when the principal has ratified or knowingly retained a benefit from the agent's action.

A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose.

RESTATEMENT (THIRD) OF AGENCY § 5.04.

In the ID, the ALJ stated that the “adverse interest” exception to the doctrine of apparent authority is a narrow one,” and in order to prevail on this issue, “Mitsui must show that it was obvious to Respondents that McClintock and Yang were acting solely for their own benefit and had abandoned Mitsui’s interests.” 32 S.R.R. at 1849. Mitsui has not shown that McClintock and Yang had abandoned its interests and were acting solely for their own benefit, or that Global Link knew or had reason to know that McClintock and Yang were acting adversely to Mitsui.

While Mitsui argues that the knowledge of McClintock and Yang may not be imputed to Mitsui, based on its position that McClintock and Yang acted adversely to Mitsui, there were benefits to Mitsui in having Global Link assume responsibility for arranging deliveries, e.g., that Mitsui avoided payment of rail detention charges, and did not have to negotiate new door points in its contracts with Global Link. Deposition of Paul McClintock, GLL App. at 9-10. In addition, Global Link’s truckers were willing to accept rates established in Global Link’s contracts with Mitsui, which “undoubtedly made split routing more attractive to Mitsui.” 32 S.R.R. at 1847 n. 59. Paul McClintock stated in his deposition that Mitsui had customers other than Global Link, who required Mitsui to use their specified truckers, who might be more expensive than Mitsui’s usual rate for trucking. McClintock stated that “[i]n the case of Global Link, they used truckers that charged what our [Mitsui’s] market rate was, so . . . the truck rate that we were paying at MOL to their – to truckers that they wanted us to use was a market rate that we agreed to.” GLL App. at 17.

Mitsui also argues that the knowledge of McClintock and

Yang may not be imputed to Mitsui, based on its argument that McClintock and Yang colluded with Global Link. As noted above, the RESTATEMENT (THIRD) OF AGENCY provides that notice will be imputed to a principal “when the principal has ratified or knowingly retained a benefit from the agent’s action.” RESTATEMENT (THIRD) OF AGENCY § 5.04(b). Mitsui knowingly retained benefits from having Global Link arrange for deliveries: avoidance of rail detention charges; avoidance of the administrative burden of modifying contracts to add additional door points; and having Global Link’s truckers accept rates that Mitsui agreed to. Furthermore, despite Mitsui’s argument that McClintock and Yang colluded with Global Link to keep split routing a secret from Mitsui, given the fact that Mitsui was apparently engaged in split routing with other customers, including Nintendo, and that McClintock found out about Mitsui’s activities with Nintendo only after he was placed in the position of Vice President of North America sales, with authority over all sales in the United States, it does not appear likely that split routing was a secret that he and Yang kept from Mitsui. *See* McClintock Deposition, GLL App. at 17, 22-25; Yang Deposition, GLL App. at 32.

Finally, Mitsui argues that knowledge of McClintock and Yang should not be imputed to Mitsui because Global Link knew that McClintock and Yang would not advise Mitsui of their actions. In addition to McClintock and Yang, knowledge of split routing was present at the operations manager level (GLL App. at 37), and at the operations staff and supervisory levels of Mitsui (GLL App. at 132-33). With knowledge of split routing present at a number of different operational levels at Mitsui, it appears unlikely that Global Link knew that McClintock and Yang would not advise Mitsui of their actions. In addition, the adverse interest exception is inapplicable when an employee with knowledge is an “executive officer, manager or superintendent whose scope of authority included supervision over the phase of the business out of which the loss or injury occurred.” *Coryell v. Phipps*, 317 U.S. 406, 410 (1943). As noted above, McClintock became Mitsui’s Vice President of Sales and Sales Support in 2006 or 2007, and was

responsible for all of Mitsui's sales people in the United States. Yang began working as a sales representative for Mitsui around 1993. Both McClintock and Yang worked on the Global Link account (GLL App. at 31), and their respective scopes of authority included "supervision over the phase of the business out of which the [alleged] loss or injury occurred." Therefore, the ALJ did not err in imputing McClintock's and Yang's knowledge of split routing with Global Link to Mitsui. The ALJ also did not err in concluding that Mitsui failed to show that it was obvious to Global Link that McClintock and Yang were acting solely for their own benefit and had abandoned Mitsui's interests, and that the adverse interest exception was therefore not applicable.

Mitsui also argues that the ALJ erred in distinguishing the decision in *Seamaster* from this case. Mitsui argues that the scheme in *Seamaster* is virtually identical to the scheme in this case, except that in *Seamaster*, it took place at origin rather than at destination. Contrary to Mitsui's argument, the decision in *Seamaster* may be distinguished from this proceeding on several grounds. In *Seamaster*, the court concluded that MOL employee Michael Yip "totally abandoned MOL's interests," and that MOL received no benefit from the scheme involved in that case, stating that "the Shenzhen door arrangement caused MOL to give away a valuable service – space protection – for free." *Seamaster*, 2013 U.S. Dist. LEXIS 40466 at \*80-82. In contrast, in this case it cannot be said that McClintock and Yang totally abandoned MOL's interests, as MOL benefited from reduced administration costs and burdens, and reduced its exposure to rail detention charges as a result of the split routing scheme with Global Link. In addition, the court in *Seamaster* noted that there was testimony in that case suggesting that Yip had an interest in Rainbow, the trucking company he suggested be used for nonexistent trucking moves. *Id.* at \*35, \*80. In the instant proceeding, there were actual trucking moves to inland destinations and there is no suggestion that either McClintock or Yang had an interest in any trucking company involved in the moves. Another distinguishing factor between the two cases is that in *Seamaster*, MOL employees other than Yip and

Yang apparently did not know of the scheme, as defendants' representatives in *Seamaster* "were careful not to communicate their discussions with Yip to others at MOL (with the exception of Yang)." *Id.* at \*73. In this case, employees other than McClintock and Yang knew about split routing with Global Link. Therefore, the ALJ did not err in distinguishing the decision in *Seamaster* from this case.

### 3. Application of the Shipping Act and the Commission's Regulations

Mitsui states that while the ALJ found that if a carrier knows about fraudulent behavior, there is no fraud and therefore no violation of the Shipping Act, in this case, Mitsui did not know that the split routing was going on. In addition, Mitsui argues that while fraud is an element of a section 10(a)(1) violation, it is not necessary that the fraud be perpetrated on the carrier. Neither of these arguments is persuasive.

As shown above, the knowledge of MOL employees McClintock and Yang about the split routing can be imputed to MOL, as a principal is charged with "notice of facts that an agent knows or has reason to know." RESTATEMENT (THIRD) OF AGENCY § 5.03. McClintock and Yang, agents of Mitsui, knew of the split routing with Global Link. In addition, the adverse interest exception does not apply in this case, based on the facts that Mitsui received certain benefits from split routing with Global Link; the split routing scheme was known to Mitsui, as seen in Mitsui's split routing with customers other than Global Link; and knowledge of split routing with Global Link was present at different operational levels at Mitsui. Therefore, Mitsui's argument that it did not know about split routing with Global Link is not persuasive.

Mitsui also argues that it is not necessary that fraud alleged as a violation of section 10(a)(1) be perpetrated against the carrier. Fraudulent activities which cause injury to shipper competitors may be considered in determining that a violation of section 10(a)(1) has

occurred, as noted by the Commission in *OC International Freight, Inc.*, 32 S.R.R. 1783, 1792 (FMC 2013). In an Initial Decision on Remand in the same proceeding, the ALJ determined that respondents violated section 10(a)(1) by permitting another entity to gain access to discounted rates available through respondents' service contract with Seaboard Marine, an ocean carrier, thereby distorting the competitive market place and violating section 10(a)(1). *OC International Freight, Inc.; OMJ International Freight, Inc.; and Omar Collado*, Docket No. 12-01 (ALJ October 30, 2013), slip op. at 7.

In this proceeding, however, there is no evidence regarding competitors of Global Link, or alleging that the split routing at issue harmed competitors of Global Link. Therefore, given that Mitsui is seeking reparations for its losses arising out of Respondents' alleged violation of section 10(a)(1), and there is no evidence of competitive harm, any fraud present in this case would necessarily have been perpetrated against Mitsui.

Mitsui also argues that the ALJ erred in applying Commission Rule 545.2, which provides that when considering whether a section 10(a)(1) violation has occurred, the Commission will not infer an unjust or unfair device or means from the failure of a shipper to pay ocean freight, in the absence of bad faith or deceit. 46 C.F.R. § 545.2. The ALJ concluded that based on Mitsui's knowledge of and consent to the split routing scheme, it did not carry its burden of proof as to bad faith or deceit by Respondents. It does not appear that the ALJ erred in his interpretation or application of this Commission rule.

#### 4. Filed Rate Doctrine

Finally, Mitsui argues that the ALJ erred in concluding that the filed rate doctrine does not apply to service contracts. Mitsui states that the filed rate doctrine is not dependent on the public availability of a rate in question, and Mitsui has maintained that in view of the filed rate doctrine, its entitlement to reparations under

section 10(a)(1) is not dependent on whether it suffered an actual injury under section 11(g) of the Shipping Act. In the ID, the ALJ stated that “[w]hile the Commission has never addressed the applicability of the filed rate doctrine to a case involving departures from rates in service contracts, the differences between tariffs and service contracts is such that the doctrine should not be extended as Mitsui contends.” 32 S.R.R. at 1850.

As noted by Mitsui, the ALJ’s comments regarding the filed rate doctrine appear to be *dicta*, as he determined that Mitsui’s complaint should be dismissed, thereby obviating the need to consider an award of reparations. Because we are affirming the ALJ’s dismissal of Mitsui’s complaint, Mitsui is not entitled to reparations and we therefore do not address application of the filed rate doctrine to the amount of reparations.

#### D. Request for Oral Argument

Mitsui requests that the Commission hear oral argument on its Exceptions, asserting that “such argument would help avoid many of the misunderstandings that seem to have contributed to the erroneous conclusions reached in the ID.” Mitsui Exceptions at 50. Respondents argue that there is no need for oral argument, given the evidence that Mitsui was fully knowledgeable and complicit in split routing. *See, e.g.*, GL Response at 50 n. 36. Based on our review of the evidence upon which the Findings of Fact and Conclusions of Law in the Initial Decision are based, and our adoption of these Findings of Fact and Conclusions of Law, we find no need to hold oral argument.

### III. CONCLUSION

Based on the analysis and discussion above, we affirm the Findings of Fact and Conclusions of Law in the Initial Decision.

THEREFORE, IT IS ORDERED, That the Commission adopts the Initial Decision.

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IT IS FURTHER ORDERED, That the request that the Commission hear oral argument on Mitsui's Exceptions is denied.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory  
Secretary